Supreme Court of the United States

OCTOBER TERM, A. D. 1915

ALICE A. CAHILL, Administratrix, etc., of the Estate of Thomas F. Cahill, deceased,

Plaintiff,

vs.

THE UNITED STATES LIFE INSURANCE CO. IN THE CITY OF NEW YORK,

Defendant.

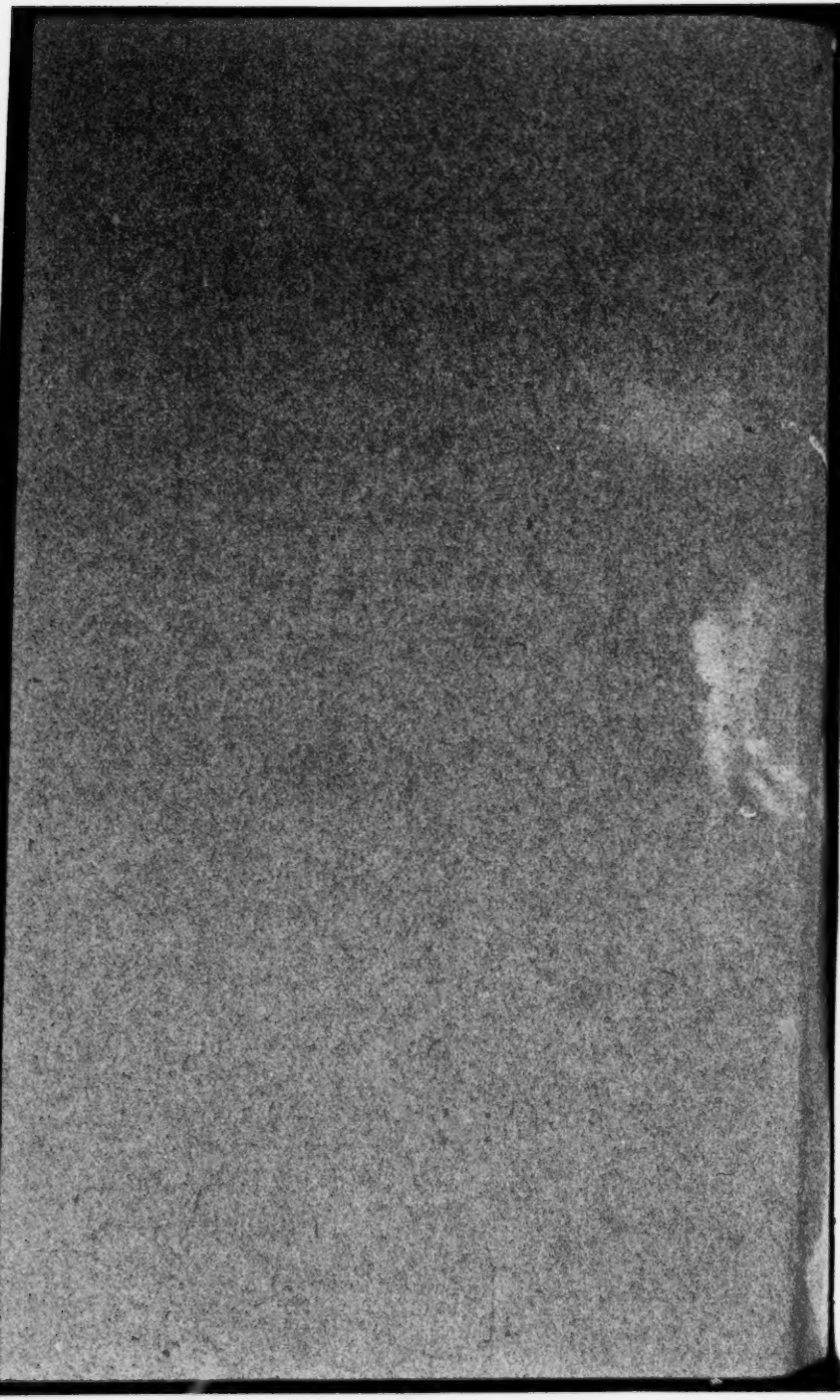
PETITION FOR WRIT OF CERTIORARI

TO REVIEW THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT TO ORDER CERTIFIED TO THIS COURT FOR REVIEW AND DETERMINATION THE CAUSE OF ALICE A. CAHILL, ADMINISTRATRIX, ETC., OF THE ESTATE OF THOMAS F. CAHILL, DECEASED, PLAINTIFF-APPELLANT, VS. THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK, DEFENDANT-APPELLEE.

BRIEF AND ARGUMENT IN SUPPORT OF SAID PETITION.

H. H. C. MILLER,
W. S. OPPENHEIM,
Solicitors and Counsel.

The Rumsey-Brown Printing Company, 27 Quincy St., Chicago.



IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

No.

ALICE A. CABLE, Administratrix of the Estate of Herman D. Cable, deceased,
Petitioner,

vs.

THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

Requiring the Circuit Court of Appeals for the Seventh Circuit to certify to the Supreme Court for its Review and Determination the case of Alice A. Cable, administratrix of the estate of Herman D. Cable, deceased, vs. The United States Life Insurance Company in the City of New York.

H. H. C. MILLER,
W. S. OPPENHEIM,
Solicitors for Petitioners.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

ALICE A. CABLE, Administratrix of the Estate of Hermam D. Cable, deceased,
Petitioner,

vs.

THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK,
Respondent.

BRIEF AND ARGUMENT.

Petition for writ of *certiorari* requiring the Circuit Court of Appeals for the Seventh Circuit to certify to the Supreme Court for its review and determination the case of Alice A. Cable, administratrix of the estate of Herman D. Cable, deceased, appellant, *vs.* The United States Life Insurance Company in the City of New York, appellee:

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court:

Your petitioner, Alice A. Cable, administratrix of the estate of Herman D. Cable, deceased, respectfully represents unto your Honors

First. That on or about the 11th day of May, 1899, peti-

tioner herein instituted an action in assumpsit in the Superior Court of Cook County, Illinois, against the respondent, on a life insurance policy issued by the respondent to one Herman D. Cable, under date of February 6, 1899, which policy provided for the payment of $50,000 in thirty consecutive annual installments of $1,666.66 each to the estate of said Cable, or the commuted value of $30,000 cash.

Second. That the respondent being a citizen of the State of New York, an hour or an hour and a half after the bringing of the said suit in the state court, filed its bill of complaint in the Circuit Court of the United States for the Northern District of Illinois against your petitioner, a citizen of Illinois, praying for the cancellation of the policy sued on in the state court and also for an injunction against your petitioner prosecuting any action against it, in the state court, on such policy. To this bill, your petitioner filed a demurrer setting forth as grounds: (1) That the bill did not state such a case as entitled the respondent to any relief in a court of equity; (2) That respondent had a full, adequate and complete remedy at law.

Third. That on the 30th day of June, 1899, the respondent having first obtained leave, filed its amended and supplemental bill in the said Circuit Court of the United States, charging diversity of citizenship, and that it was engaged in the business of insuring lives throughout the United States; that on the 17th day of February, 1899, it had executed a policy of insurance on the life of Herman D. Cable for the sum of $50,000 and had transmitted such policy to its agent at Chicago, Illinois; that such policy was tendered to said Cable on the 21st day of February, 1899, who refused to receive it, stating that

he desired further information concerning the respondent; that subsequently said Cable fell ill of pneumonia and on the 27th day of February, 1899, his life was dispaired of, and that on said day George S. Lord fraudulently procured the Cable policy from the respondent by concealing the fact of the illness of Cable, and paid the premium out of his own funds; that the delivery of the policy was without the authority or knowledge of Cable, and that the defendant company was ignorant of the illness of Cable until after his death, which occurred the third day subsequent to the delivery of the policy.

It was further alleged that suit was brought prior to the filing of the bill by petitioner in the state court against the respondent for the amount of the policy, and that under the Constitution and laws of the United States the respondent had the right to remove said action at law to the Circuit Court of the United States, but that the State of Illinois by legislative enactment had sought to prevent the removal by insurance companies of such actions, and had practically destroyed such right, inasmuch as such statute provides that an insurance company shall forfeit and lose its right to do business in the State of Illinois upon removing any such action to the United States Court. It also averred that the laws of the State of Illinois, as interpreted by its highest legal tribunal, are somewhat different from the laws of the United States as interpreted by the Federal courts upon the same question, and that the rulings of the state court were unduly and erroneously adverse to insurance companies, and that, under the facts and circumstances set forth in the bill, the respondent would be without a due and proper remedy in the state courts in respect to the claim of petitioner. Respondent demanded a cancellation of the policy and an injunction against petitioner prosecuting her cause in the state courts

The demurrer filed to the original bill was ordered to stand to the amended and supplemental bill and upon argument before the Hon. Christian C. Kohlsaat, in said Circuit Court of the United States, was sustained and a decree entered dismissing the bill for the reason that the respondent had a full, complete and adequate remedy, by making its defense to the action at law brought against t in the state court.

Fourth. And your petitioner further shows that afterwards, on the 10th day of July, 1899, an appeal in said cause was duly allowed and issued from the Circuit Court of Appeals for the Seventh Circuit upon the petition of respondent and it was ordered that a certified transcript of the record and of all proceedings in said cause be forthwith transmitted to the United States Circuit Court of Appeals and that afterwards, on the 1st day of August, 1899, a certified transcript of the record and of all proceedings of said Circuit Court in said cause was filed in the United States Circuit Court of Appeals for the Seventh Circuit, and the said cause was entered and admitted in said Court of Appeals and entitled United States Life Insurance Company in the City of New York, appellant, *vs.* Alice A. Cable, administratrix of the estate of Herman D. Cable, deceased, appe'lee.

Fifth. That said cause came on to be heard in said Circuit Court of Appeals on the 27th day of October, 1899, before the Honorable William A. Woods, United States Circuit Judge for the Seventh Circuit, Honorable Romanzo Bunn, United States District Judge for the Western District of Wisconsin, and Honorable William A. Allen, United States District Judge for the Southern District of Illinois, and was duly tried in said court, and on the 2d day of January, 1900, the court entered a final judgment, reversing the

decree of the Circuit Court and remanding said cause for further proceedings. The Honorable Romanzo Bunn, District Judge, in delivering the opinion of said court and reversing the said decree gave the following grounds therefor:

"A suit at law has been commenced in the state court of Illinois to recover upon the policy. And if it be an adequate remedy at law to turn the plaintiff over for litigation of its rights in the state court, under the circumstances set out in the bill, then the United States Circuit Court in equity should disclaim jurisdiction, but there are two reasons why we think the remedy thus open to the plaintiff of having its rights determined in an action at law, does not meet the requirements of the rule: The first is, that the plaintiff being a citizen of New York and the defendant a citizen of Illinois, the plaintiff, under the constitution, has the right to come to the Federal court for an adjudication. For a person entitled to litigate in the Federal court, it is not an adequate remedy at law to be invited into a state court by his antagonist to adjudicate his rights. Second, the remedy open to the plaintiff is one not under its own control, but in the control and discretion of the opposite party."

Sixth. That on the 3d day of February, 1900, an order was entered in the Circuit Court of the United States redocketing said cause, setting aside the decree entered therein and directing the defendant to answer the amended and supplemental bill, and on the 13th day of February, 1900, an answer was filed by the petitioner in which is expressly denied the alleged fraud in the procurement of the policy, affirming that the respondent had full notice of the illness of Cable at the time of the delivery of the policy; that its procurement was obtained by the express authority of Mr. Cable and the premium paid out of his funds; that Cable was not dangerously ill at the time of the delivery of the policy, and that no danger of death was then apprehended by himself or family.

Petitioner further alleged that before respondent had become entitled to do business in the State of Illinois, it had filed its written agreement to not remove or make application to remove by the United States Court any action or proceeding commenced against it in the state courts, upon any claim or cause of action arising out of any business transaction done in said state, and was granted a license by said state to do business on the basis of said agreement; and that it was further provided by the laws of Illinois, that should the respondent fail to keep its said agreement, then it was the duty of the authorities of the state to revoke respondent's license to do further business in this state, but denied that the laws of the state upon questions involved in this suit as interpreted by its highest legal tribunal are different from the laws as interpreted by the Federal courts upon the same question, or that the laws as enforced by the state are erroneously adverse to insurance companies.

Petitioner fruther answered that the respondent had an adequate and complete remedy at law by setting up in the suit brought in the state court, all of the alleged facts set out in the amended and supplemental bill; that the Circuit Court of the United States should not take jurisdiction in the matter, and further denied that the respondent wes entitled to any relief under its amended and supplemental bill.

To this answer a replication was filed and the cause referred to William M. Booth, as master in chancery, to take proofs and report the same.

Seventh. That on the 5th day of October, 1900, said master in chancery filed his report in said cause, together with objections thereto made by petitioner, in the Circuit Court, by which the facts set out in the answer were

practically found true. The objections filed by petitioner were ordered to stand as exceptions in the Circuit Court, and after hearing of the same had before the Hon. Christian C. Kohlsaat on the 21st day of December, 1900, a decree was entered, confirming the master's report in part, and finding affirmatively that at the time of the delivery of the policy by the agent of the respondent to Lord, he, Lord, in good faith and without any intent to defraud the respondent, or conceal the real condition of the health of said Cable, stated that Cable had been sick for two or three days, but was no worse than he had been during the last forty-eight hours, and that no further statement was made in regard to the condition of said Cable, nor were any further inquiries made by respondent's agent in regard thereto.

The court found that the procurement of the policy was a constructive fraud, but that no actual fraud was intended or practiced in the delivery of the policy and the cancellation of the policy was decreed.

Eighth. Your petitioner further shows that thereafter on the 31st day of October, 1900, an appeal in said cause was duly allowed and issued from the Circuit Court of Appeals for the Seventh Circuit upon the petition of your petitioner, and it was ordered that a certified transcript of the record and all proceedings in said cause be forthwith transmitted to said United States Court of Appeals, and that afterwards on the 11th day of January, 1901, a certified transcript of the record and of all proceedings of said court in said cause was filed in the United States Circuit Court of Appeals for the Seventh Circuit and said cause was entered and admitted in said court of Appeals and entitled Alice A. Cable, administratrix of the estate of Herman D. Cable, deceased, appellant, *vs.* The United

States Life Insurance Company in the City of New York, appellee, No. 762; that the assignment of errors filed on behalf of your petitioner set out, among other errors in said record, the following:

(1) The Circuit Court erred in entering a decree ordering cancellation of the policy of insurance issued to the insured;

(5) The Circuit Court erred in holding that the appellee did not waive the provisions of the policy as to its delivery during the sound health and insurable condition of the insured.

(6) The Circuit Court erred in holding and adjudging that the information given it at the time of the delivery of the policy that the insured had been sick for two or three days, but was no worse than he had been for the last forty-eight hours, without giving further details as to the nature and character of the illness, was a constructive fraud, which vitiated the policy, notwithstanding that no further inquiry was made by appellee as to the nature or character of such illness.

(7) The Circuit Court erred in not dismissing the amended and supplemental bill of complaint and remitting appellee to make its defense in the action at law brought by appellant against appellee in the state court.

Eleventh. That said cause came on to be heard in said Circuit Court of Appeals on the 11th day of April, 1901, before the Hon. William A. Woods, United States Circuit Judge for the Seventh Circuit, Hon. John G. Jenkins, United States Circuit Judge for the Seventh Circuit, and the Hon. Peter S. Grosscup, United States Circuit Judge for the Seventh Circuit, and was duly tried in said court, and on the 2d day of October, 1901, the court rendered

final judgment affirming the said decree in said Circuit Court entered in said cause as aforesaid, and that the Hon. John G. Jenkins, Circuit Judge, in delivering the opinion of said court in affirming said decree, said:

"On February 21, 1899, Cable had tentatively declined to accept the policy, deciding to be guided in his judgment by the action of his intimate friend Lord, who had made a like application upon his own life to the same company. The policy was thereupon returned by McCabe to Finney, the broker from whom he received it. The policy on Lord's life was on the same day left with him, and he was requested to send a check for the premium. Six days afterwards, and on the 27th of that month, McCabe called upon Lord and asked for the payment of the premium upon his policy. Lord asked him if he had the Cable policy, to which McCabe answered 'No,' but that he could get it in a few minutes; whereupon Lord told him to get it, and that he (Lord) would pay him the amount of both premiums. McCabe procured the Cable policy, returned with it to Lord's office, and handed it to the latter, saying as he did so, 'Cable is all right, isn't he?' Here occurs somewhat of a conflict in the evidence. McCabe says that Lord, in a very low voice, without looking at him and in a casual manner, answered, 'The same as he has been for forty-eight hours;' conveying to McCabe's mind the meaning that Cable was all right. Lord says that he answered: 'No; Mr. Cable has been sick for two or three days, but he is no worse than he has been for the last forty-eight hours.' The master and the court below found the fact to be as stated by Lord, and, while there is much in the testimony throwing doubt upon the correctness of this conclusion, we are content to take the fact as found by the master and adopted by the court."

That a certified copy of the entire records of said cause in said Circuit Court of Appeals is herewith furnished, marked "Exhibit A" and made a part hereof.

Ninth. Your petitioner is further advised and believes that the judgment of the United States Circuit Court of Appeals in said cause rendered on the 2d day of January,

1900, reversing the decree of the United States Circuit Court dismissing said amended and supplemental bill, and the said decree of the United States Circuit Court entered on the 21st day of December, 1900, and the said judgment of the United States Circuit Court of Appeals, affirming the said last mentioned decree, are erroneous, and that this Honorable Court should require the said cause to be certified to it for its review and determination under and in conformity with the provisions of the statute in that behalf made and provided.

Tenth. Your petitioner is further advised and believes that the said United States Circuit Court of Appeals in its judgment rendered on the 2d day of January, 1900, erred in ruling that the demurrer filed by the petitioner to the amended and supplemental bill of complaint should have been overruled by the United States Circuit Court and that the said decree dismissing the amended and supplemental bill should be reversed and the cause remanded for further proceedings; that the said United States Circuit Court of Appeals erred in holding that the respondent under the constitution had the right to file its bill in equity in the United States Court to cancel an insurance policy after the death of the insured and suit had been brought upon the policy against respondent in the state court; that said Circuit Court of Appeals erred in ruling that respondent did not have an adequate remedy at law by making its defense in the suit brought against it by petitioner in the state court; that said Circuit Court of Appeals erred in ruling that respondent had the right to file its bill in equity in the United States Courts to cancel the policy of insurance, notwithstanding it could make its defense to the suit at law pending in the state court by setting up all the matters and facts alleged in the bill; that

said Circuit Court of Appeals erred in ruling that the statute of Illinois, by requiring respondent to bind itself not to remove a suit at law brought against it, as a condition precedent to secure a license to do business in the State of Illinois, and further providing for the revocation of its license to do business, should it so remove such suit, was so burdensome, as to enable respondent to apply in equity to the United States Circuit Court to cancel the policy of insurance sued on in the state court; that said Circuit Court of Appeals erred in ruling that a bill in equity would lie to cancel an insurance policy after loss, although suit at law was then pending thereon, because the prosecution of such suit was within the control and discretion of the opposite party.

Eleventh. Your petitioner is further informed and believes that the said United States Circuit Court on said second appeal erred in holding the information conveyed by Lord to respondent's agent at the time of the delivery of the policy that Cable had been sick for two or three days, but was no worse than he had been for the last forty-eight hours, without any further inquiry being made by respondent's agent, was a constructive fraud which vitiated the policy; that said court erred in entering a decree ordering a cancellation of the policy of insurance.

Twelfth. Your petitioner is further informed and believes that the said United States Court of Appeals for the Seventh Circuit in affirming the decree of said United States Circuit Court cancelling said policy of insurance, erred in ruling that the delivery of said policy was procured by fraud in that the respondent was not sufficiently advised of the serious condition of the insured at the time of the delivery of the policy; that said Circuit Court of Appeals erred in holding that the information given to Me-

Cabe by George S. Lord at the time of the delivery of the policy and payment of the premium that Cable had been sick for two or three days, but was no worse than he had been for the last forty-eight hours, was not sufficient notice of the illness of Cable and a waiver by respondent of the condition of its policy requiring a delivery of the same during the sound health and insurable condition of Cable.

Thirteenth. Your petitioner further shows unto your Honors that two questions of special importance arise upon this record which should be authoritatively and finally adjudged by this Honorable Court upon a full presentation to this court of the matters involved.

1st. The fundamental question of the right of a foreign insurance company to bring a suit in equity in the United States Courts to cancel a policy of insurance issued by it after loss has occurred upon the policy and after suit has been brought upon the policy in a state court, where the statute of the state forbids a removal of such action at law to the Federal court under penalty of forfeiture of the license of the insurance company to do further business in the state.

2d. The important questions of substantive law as to whether notification to an insurance company of the illness of an applicant for insurance at the time of the delivery of the policy and payment of the premium is a waiver by the company of the provision in its policy requiring its delivery to be made only during the sound health and insurable condition of the applicant. Wherefore your petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this court directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding the said court

to certify and send to this court on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in said cause, therein entitled "Alice A. Cable, administratrix of the estate of Herman D. Cable, deceased, appellant, *vs.* United States Life Insurance Company in the City of New York, appellee" No. 762, to the end that the said cause may be reviewed and determined by this court pursuant to the provision of the statute in such case made and provided, and that your petitioner may have such other and further relief or remedy in the premises as to this court may seem proper, and that the said judgments of said Circuit Court of Appeals for the Seventh Circuit and the decree of the said Circuit Court for the Northern District of Illinois, Northern Division, entered on the 21st day of December, 1900, and each and every part thereof may be reversed by this Honorable Court.

And your petitioner will ever pray, etc.

ALICE A. CABLE,
Administratrix of the estate of Herman D. Cable, deceased.

By H. H. C. MILLER and
W. S. OPPENHEIM,
Her Solicitors.

State of Illinois, } ss.
Cook County. }

William S. Oppenheim, being first duly sworn, says that he is one of the solicitors and of counsel for Alice A. Cable, administratrix of the estate of Herman D. Cable, deceased, the petitioner above named, and as such had personal charge of the case in the foregoing petition mentioned in the Circuit Court of the United States for the Northern District of Illinois, Northern Division, and in the United States Circuit Court of Appeals for the Seventh Circuit; that he has read said petition by him subscribed and that the allegations therein contained are true of his own personal knowledge, except such allegations as are stated to be upon information and belief, and that as to these he believes them to be true.

. . . . . .

Subscribed and sworn to before me this . . . . . day of February, A. D. 1902.

. . . . . .

Notary Public.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

ALICE A. CABLE, Administratrix of the Estate of Herman D. Cable, deceased,
Petitioner,

vs.

THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK,
Respondent.

STATEMENT.

This is a suit in equity brought by the respondent against the petitioner to cancel a policy of insurance issued by the respondent upon the life of Herman D. Cable. Prior to the time of the filing of the bill herein, a suit at law had been instituted by the petitioner against the respondent in the Superior Court of Cook County, Illinois, upon the policy sought to be cancelled. An amended and supplemental bill was subsequently filed by the petitioner and upon demurrer it was dismissed in the Circuit Court by Judge Kohlsaat. (Pr. Rec. XXXVII.) The decision of Judge Kohlsaat was based upon the authority of *Phœnix Life Insurance Co.* v. *Bailey*, 13 Wall., 616. The decree

dismissing the bill upon appeal was reversed by the Circuit Court of Appeals, with directions to overrule the demurrer to the bill. The Court of Appeals in its opinion practically holds that the respondent, by agreeing with the State of Illinois not to remove any cause brought against it in the state courts to the United States Court, thereby obtained the right to file its bill in equity in the Federal court to cancel a life insurance policy after loss had occurred and suit been brought on the policy in the state court. That the constitution gave respondent the right to have its cause tried in the Federal court, and inasmuch as the agreement under which it obtained its license from the state was so burdensome in the event of the removal of a suit brought in the state court to the Federal court, the Federal court would take charge of the litigation on its equity side, notwithstanding the matters set out in the bill of complaint could be set up in the state court as a defense to the action of the policy. A further ground was given that the action at law was under the control of the petitioner. (Pr. Rec., XXXVIII–XLVII.)

Upon filing the mandate of the Circuit Court of Appeals, the cause was redocketed in the Circuit Court and an answer filed by petitioner denying the various charges of fraud made in the bill of complaint and asserting that the court should not take jurisdiction of the cause, for the reason that respondent had a full and adequate remedy at law by setting up the matters urged in the bill, as a defense to the action in state court. (Pr. Rec., 26–31.)

A reference of the cause was had by William M. Booth master in chancery, who made a finding of facts. (Pr. Rec., 34–44.) The master's report practically finds the allegations of the answer to be true, except as to the nature of the information which had been conveyed to the

agent of respondent at the time of the delivery of the policy, and payment of the premium. The policy had been tendered Mr. Cable on the 21st day of February, 1899, and declined by him at that time, he stating that he did not have time to look into the matter, but would be guided a good deal by what Mr. Lord said and did.

On February 24th, Mr. Cable fell ill of pneumonia, and on the 27th day of February, 1899, the agent called upon Mr. Lord, who asked him if he had Mr. Cable's policy with him, and upon his reply that he had not, he was told to get it and that he, Lord, would pay the amount of the premium on his policy, as well as that of Mr. Cable. McCabe got the policy and handed it to Mr. Lord, saying as he did so: "Is Mr. Cable all right?" and Mr. Lord responded "No, Mr. Cable has been sick for two or three days, but he is no worse than he has been for the last forty-eight hours." (Pr. Rec., 37.) The master concluded from this statement that while it was substantially true it was deceptive in its nature and not calculated or intended to inform McCabe as to the serious condition of Cable's health, or lead him to suspect it. (Pr. Rec., 39.)

The court sustained an exception to this finding of the master and affirmatively found that at the time Lord was asked by McCabe as to the then condition of Cable, he in good faith, and without any intention to defraud the complainant or conceal the real condition of the health of said Cable, stated that Cable had been sick for two or three days, but was no worse than he had been during the last forty-eight hours, and that Lord made no further statement in regard to the condition of Cable, nor were any further inquiries made by McCabe in regard thereto, and concluded therefrom that the policy was procured on behalf of the deceased by constructive fraud, but that no actual fraud

was intended or practiced in the delivery of the same. Thereupon a decree was entered adjudging the policy void and directing it cancellation. (Pr. Rec., 148, 149.)

On October 1, 1901, the Circuit Court of Appeals affirmed this last decree entered by the Circuit Court. The finding of facts as made by the Circuit Court was adopted by the Circuit Court of Appeals. (Pr. Rec., 178.) The case was heard before Judges Woods, Jenkins and Grosscup. Prior to the time of the rendering of the opinion, Judge Woods had departed this life, but it is stated that he concurred in the conclusions reached. Judge Grosscup states that he concurs in the opinion, the jurisdictional question having been settled upon the former appeal. (Pr. Rec., 180.)

It was attempted at the last hearing to have the court re-consider its former opinion upon the jurisdictional question, but this it declined to do. The affirmance of the decree is based upon the ground that the information which was given by Lord to McCabe at the time of the delivery of the policy, was not sufficient to put the petitioner upon notice as to the then condition of Cable.

BRIEF AND ARGUMENT.

I.

Where a suit at law is brought against an insurance Company for a loss sustained under an Insuance policy a court of chancery has no jurisdiction to cancel the policy, since every ground set forth in the bill of complaint can be set up and tried as a defense in the action at law.

Phœnix Life Ins. Co. v. *Bailey*, 13 Wallace, 616.
Ætna Life Ins. Co. v. *Smith*, 73 Fed., 318.
Home Ins. Co. v. *Stanchfield*, 1 Dill., 424.
Revised Statutes of the United States, Sec. 723.

A foreign insurance company has no right to do business in a state without license and all contracts entered into by it are controlled by the statutes of the state.

New York Life Ins. Co. v. *Cravens*, 178 U. S., 389.

The respondent procured its license to do business in the State of Illinois upon filing its express written agreement that no suits at law which might be brought against it in the courts of this state should be removed to the courts of the United States, and if it did cause such a removal, its further right to do business in the State of Illinois should be revoked. The statute does not forbid a removal to the Federal courts of a suit brought against it in the state court, but reserves the right to revoke the license issued under this written agreement, if the

insurance company does not submit its controversies to the judgment of the state courts, and stand upon the same footing as domestic companies. The statute under which this contract is made is constitutional and the agreement valid and binding.

Doyle v. *Continental Ins. Co.*, 94 U. S., 535.

The Court of Appeals holds that by securing its license under this statute, the respondent has the right to apply to the chancery side of the Federal court in the first instance and deprive the beneficiary in the policy of the right of trial by jury guaranteed to her by the Constitution of the United States. The first reason given for this is that the complainant "being a citizen of New York and the defendant a citizen of Ilinois, plaintiff (complainant) under the constitution has the right to come to the Federal court for an adjudication. For a person entitled to litigate in the Federal court, it is not an adequate remedy at law to be invited into a state court by his antagonist to adjudicate his rights."

This reasoning is unsound, because the respondent had the right to remove the cause brought against it to the Federal court if it saw fit. It is true that it procured its license to do business in the state upon the agreement that it would not remove such a cause and that if it did so, its further right to do business in the state might be revoked. But there is no provision in the statute or its contract, which forbids the removal. It can do so at its option. Nor can any moral ground be urged against the respondent having its causes tried in the same court as that of domestic insurance companies in the State of Illinois.

The attempt to distinguish the case at bar from that of

Phoenix Life Ins. Co. v. *Bailey, supra,* is without justification. The only claimed difference is that the Bailey case at law was pending in the courts of the District of Columbia, while the present one was brought in the state court of Illinois. Without this alleged distinction, it must be conceded that the decision of the Circuit Court of Appeals is directly opposed to the opinion of this court in the Bailey case.

In taking jurisdiction of this cause, did not the Circuit Court of Appeals err and enable the respondent to perpetrate a fraud upon the People of the State of Illinois, and, with impunity, to violate its express agreement under which it was permitted to do business in the state and still retain all the benefits of its contract? It could not do business within the limits of the state without first securing its license under this written agreement. The agreement was one the state had the right to exact, and is legally binding.

The respondent refrains from removing the suit brought against it in the state court, but violates the spirit and essence of its agreement by appealing to the chancery side of the Federal court, alleging that it made this contract and if it violates its terms will be denied the right to further carry on its business in the State of Illinois. Upon this ground it asks a court of equity to relieve it from a binding agreement, fairly entered into, and, at the same time, deprive a person having a claim against it for a loss under a policy, from having her action tried by a law court, which otherwise would have exclusive cognizance of the suit. And what is the answer given by the Court of Appeals to this most remarkable request?

"It is true you entered into a legal contract not to remove suits brought against you in the state courts to the

Federal courts, and this was done as a condition precedent to procuring a license without which you could not do business in the state. Your agreement is lawful and binding. While you have the right to remove the cause brought against you to the Federal court, such action being in contravention of your agreement, will likely result in a revocation of your license. You desire to obtain all the benefits of your contract, but avoid its burdens. Not only this but more will be done for you; we will give you the right to have your case tried in the Federal court and because of this contract, have the same tried in equity denying your opponent his constitutional right to a trial by jury. If you fail to maintain your bill in equity, your adversary may then bring her suit at law against you, which could have been done in the first instance had you not entered into this lawful agreement with the state to try your cause with her in the state tribunal."

II.

The second reason given by the Circuit Court of Appeals for a reversal of the decree dismissing the bill, is "the remedy open to the plaintiff (complainant) is one not under its own control, but in the control and discretion of the opposite party." If this is a basis of equity jurisdiction then every suit at law, whether brought in the Federal or state courts, can be enjoined, and no action at law can be maintained if the defendant desire to bring his bill in equity concerning the matters complained of, against him. The proposition seems so unsound and without merit that its simple statement is its own refutation.

III.

Suit was brought by petitioner against the respondent in the state court and summons issued prior to the filing of the bill of complaint. (Pr. Rec., 50.) This gave the

state court exclusive jurisdiction over the subject-matter, and the Federal court could not subsequently enjoin or oust the state court of its rightful jurisdiction.

Farmers Loan & Trust Co. v. *Lake Street Elevated R. R. Co.*, 177 U. S., 51.

IV.

The Circuit Court found at the time the policy was delivered that the agent of respondent, in reply to a question as to whether Mr. Cable was all right, was informed: "No, Mr. Cable has been sick for two or three days, but he is no worse than he has been for the last forty-eight hours." It was further held that this statement was made in good faith and without any intent to defraud respondent or conceal the real condition of the health of Cable, and that no further inquiries were made in regard to Cable's health. (Pr. Rec., 148.) This finding of fact, while approved by the Court of Appeals, is said to have not been a full disclosure of the condition of Mr. Cable's health, and, therefore, a constructive fraud upon the respondent, such as to vitiate the policy. At the time of the making of this statement, it was the belief of the person receiving the policy and of the family and physician of Mr. Cable that he would recover from his then illness. (Pr. Rec., 29.)

We respectfully submit that the disclosure made by Mr. Lord to the agent of respondent was sufficient to put him upon guard and ample notice to the company of the then condition of Mr. Cable's health and that the delivery of the policy with such knowledge was a waiver of its provision concerning the delivery of the same during the good health of the insured.

Phœnix Life Insurance Co. v. *Raddin*, 120 U. S., 183.

Marston v. *Kennebec Ins. Co.*, 89 Me., 266.

German American Ins. Co. v. *Morris*, 100 Ky., 29.

Joyce on Ins., Sec. 1870.

Manhattan Life Ins. Co. v. *J. P. Willis & Bro.*, 60 Fed., 236.

V.

The decision of the Court of Appeals, reversing the decree of Judge Kohlsaat, dismissing the bill, is one that has caused much adverse comment and it is evident that Judge Grosscup, in concurring in the last opinion of the Court of Appeals, was of the opinion that the first decision was not sound. If adhered to it gives foreign insurance companies in almost all of the states of the Union, rights possessed by no other citizens. By entering into a valid contract with a state in order to procure its license, to do business therein, it thereby becomes enabled to apply to the chancery side of the Federal court in every case where more than $2,000 is involved and to deny the insured or beneficiary the right of a trial by jury, as guaranteed under the Constitution of the United States. Should the chancellor hold adversely to the insurance company no relief is awarded to the injured party. He must then seek a court of law, and bring his suit upon the common law side of the court and again litigate with the insurance company his rights against it. Had the state not passed such a statute and the insurance company not entered into the agreement, no one could urge that the insurance company could apply to a court of equity to cancel the policy after loss.

We respectfully submit that the courts of the state are able to do justice between the parties, and when the respondent obtained its license to do business in the state upon the express agreement that it would submit its controversies to the courts of the state and no longer do business therein should it decline to do so, a Federal Court of Chancery should not step in and deprive a party suing the insurance company in a state court of his right to a trial by jury, because the insurance company had entered into a valid contract with the authorities of the state not to remove such cause to the Federal court.

H. H. C. MILLER,
W. S. OPPENHEIM,
Solicitors for Petitioner.